# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PACO COMONTE,

Defendant-Appellant.

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UNPUBLISHED
September 18, 2007

No. 270684
Wayne Circuit Court
LC No. 05-011637-01

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of discharge of a firearm toward a dwelling or occupied structure, MCL 750.234b, arson of a dwelling house, MCL 750.72, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of one to four years for the discharge of a firearm conviction, 99 months to 20 years for the arson conviction, and one to five years for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise out of the firebombing and shooting of Rolanda Stevenson's house on Hanna Street in Detroit. Stevenson and Ebony Jackson engaged in a physical altercation at the home. Two other women, Keyanna and Vanessa Hayford, became involved in the altercation, and Jackson was beaten quite badly. Stevenson, Keyanna, and Vanessa lived in the home, and Jackson was residing with them at that time. Jackson indicated that she was going to call defendant, her boyfriend, and that he was going to "shoot up" the house. Later that night, Stevenson saw defendant, another male, and Jackson in front of her house in defendant's car. Defendant got out of the car and pointed a gun at the house, while the other male held a beer bottle with a white rag in it. Stevenson heard gunshots and a "poof" sound and saw "orange." Another occupant of the house heard a bottle break and saw flames. When Stevenson thereafter came out of the house, her son's go-cart was on fire on the front porch.

Defendant first argues that the evidence was insufficient to support his conviction for arson of a dwelling house. He also contends that the trial court's findings were inadequate to convict him of that offense. When determining whether sufficient evidence exists to support a conviction, a court must view the evidence in the light most favorable to the prosecution and

determine whether a rational factfinder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Further, in reviewing whether a trial court's factual findings are sufficient to support a conviction, we must determine whether the trial court was aware of the factual issues and correctly applied the law to the facts. *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990).

In a bench trial, the court must make specific factual findings and conclusions of law and state its findings and conclusions on the record or in a written opinion. MCR 6.403; *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). A trial court need not, however, make specific findings of fact regarding every element of a crime. *People v Wardlaw*, 190 Mich App 318, 320-321; 475 NW2d 387 (1991).

Defendant contends that the evidence was insufficient to establish, and the trial court failed to find, that the house or its contents were burned within the meaning of MCL 750.72. We disagree. MCL 750.72 provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years.

Regardless of whether the go-cart on the front porch was part of the contents of the home for purposes of the arson statute, the evidence also established that some aluminum siding on the house burned and melted, that the porch banister was charred, and that flames licked the overhang of the porch, which evidenced sooting. Thus, contrary to defendant's argument, there was evidence that the house itself was burned. Defendant offers no support for his argument that appurtenances affixed to the exterior of a home are not part of the dwelling house itself. In fact, in *People v Riddle*, 467 Mich 116, 135-137; 649 NW2d 30 (2002), our Supreme Court determined that the "castle doctrine," an exception to the general duty to retreat and refrain from using deadly force, applies in one's own dwelling, including its attached appurtenances. As such, defendant's argument that the siding, banister, and porch canopy are not part of the dwelling house lacks merit. We note that, even if the porch did not constitute part of the dwelling house, it would then certainly qualify as "any building within the curtilage of such dwelling house." MCL 750.72.

Further, the trial court's findings were adequate to support defendant's conviction. It appears from the court's findings that it was aware of the factual issues and correctly applied the law to the facts. *Vaughn, supra* at 384. The trial court stated as follows:

> He's also charged with the burning of a dwelling house. That the defendant burned, set fire to or did something that resulted in the fire, or helped persuade someone else to do it, and there was charring, no matter how much. And at the time there was a dwelling house, which we know the definition of. There's no question that was satisfied. And that when he did it he intended to burn it or the contents; intentionally committed an act that created the risk; that

> the defendant knew of that risk and disregarded it. There's no question a Molotov cocktail was thrown on the porch and the defendant did so, either as a principle or as an aider and abetter.

The trial court did not address whether the dwelling included its appurtenances because the issue was not contested. Rather, the court stated that there was no question that the dwelling element was satisfied. Moreover, the trial court correctly recognized that only slight damage to the structure was necessary to establish burning as contemplated by the statute. *People v Losinger*, 331 Mich 490, 502-503; 50 NW2d 137 (1951). Therefore, the trial court's findings were sufficient.

Defendant next argues that this case should be remanded to allow him to move for resentencing regarding his arson conviction because his sentencing guidelines were misscored. We note that this Court granted defendant's motion to remand,[1] and the trial court denied defendant's motion for resentencing on remand. Although defendant arguably waived his challenges to the scoring of Offense Variables (OVs) 7, 8, 10, and 12 by agreeing at sentencing that the proper guidelines range was 99 to 240 months, see *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000), we will address this issue because the trial court did not discuss the OVs at sentencing, but rather, addressed them only on remand pursuant to defendant's motion for resentencing.

"Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A sentencing court has discretion in determining the number of points to be assessed for each variable, provided that record evidence adequately supports a given score. *Id*. "Scoring decisions for which there is any evidence in support will be upheld." *Id*.

Defendant argues that OVs 7, 8, 10, and 12 were misscored. OV 7 allows for the scoring of 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The evidence supported the trial court's ruling to score 50 points with respect to OV 7, and, in fact, defendant engaged in the criminal acts at issue in this case specifically to retaliate against members of the household and cause them fear and anxiety. Thus, defendant was properly scored 50 points under OV 7.

The trial court also addressed defendant's challenges to the scoring of OVs 8 and 12 on remand and agreed with defendant. Under the corrected scoring, defendant was assessed zero points for both variables. Therefore, he is entitled to no further relief regarding these variables.

In addition, the trial court addressed on remand defendant's challenge to the scoring of OV 10, regarding exploitation of a vulnerable victim. We need not substantively address this

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[1] *People v Comonte*, unpublished order of the Court of Appeals, entered March 1, 2007 (Docket No. 270684).

issue because any error in scoring 15 points under OV 10 would not affect defendant's sentencing guidelines range. Defendant's OV level remains at VI regardless of whether he is assessed points under OV 10. Under MCL 769.34(10), we must affirm a sentence if, as here, the minimum sentence is within the appropriate sentencing guidelines range. Moreover, the trial court declined to resentence defendant and in fact opined that he received a rather lenient sentence considering the circumstances of this case. Thus, defendant is not entitled to resentencing.[2]

Defendant next argues in a Standard 4 brief that he was denied the effective assistance of counsel because defense counsel failed to properly investigate and call exculpatory witnesses to testify at trial. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, and this Court denied his motion to remand to move for an evidentiary hearing, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law that we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, *supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302.

Defendant argues that his trial counsel failed to fully investigate and call witnesses who could have provided an alibi defense. Defendant relies on the affidavits of four persons, including himself, averring that he could not have committed the offenses because he was at the home of his girlfriend, Anitra Lester, at the time that the offenses occurred. The affidavits of Lester and her mother state that defendant arrived at their home at approximately 11:30 p.m. on

[2] On appeal, the prosecution argues that defendant should have been scored points under certain OVs that defendant does not challenge on appeal. We note that the prosecution's arguments are not properly before this Court because it did not file a cross appeal regarding the challenged variables pursuant to MCR 7.207. "An appellee is limited to the issues raised by the appellant unless it files a cross-appeal as provided in MCR 7.207." *Martin v Rapid Inter-Urban Transit Partnership*, 271 Mich App 492, 502; 722 NW2d 262 (2006). Although the prosecution was not required to file a cross appeal to assert alternative arguments supporting the scoring of the OVs that defendant challenges on appeal, it was required to file a cross appeal to challenge the scoring of variables not raised by defendant. See *Vandenberg v Vandenberg*, 253 Mich App 658, 663; 660 NW2d 341 (2002). Therefore, the prosecution's arguments are not properly before this Court. *Martin*, *supra* at 502.

October 13, 2005. The offenses involved in this case, however, occurred on the night of October 12, 2005, and the early morning hours of October 13, 2005. Therefore, according to their affidavits, Lester and her mother could not have provided an alibi defense for defendant. In addition, the affidavit of Patricia Alexander, defendant's mother, states that she told trial counsel that friends of defendant had contacted her and were willing to testify on defendant's behalf. Alexander's affidavit does not identify the persons willing to testify, however, or indicate what the substance of their testimony would have been. Defendant's affidavit is similarly deficient. Thus, although defendant was entitled to have his counsel investigate and present all substantial defenses, he has not shown that he made a good-faith effort to avail himself of this right. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Accordingly, he has not demonstrated deficient performance or a reasonable probability that, but for counsel's assumed errors, the result of the proceeding would have been different.

Moreover, Stevenson positively identified defendant as the person who fired shots at her house. Stevenson recognized defendant because he had previously visited Jackson at Stevenson's home. In addition, the trial court disbelieved defendant's sole witness, Grenisha King, who testified that she overheard Stevenson say "I don't know if [defendant] did it or not. I'ma [sic] say he did it because of that bitch Ebony." King initially denied being a friend or relative of anyone in the courtroom, but admitted on cross-examination that defendant is the father of her child. In its findings of fact and conclusions of law, the trial court determined that King perjured herself during her testimony. Therefore, defendant has failed to overcome the presumption that counsel's failure to call alibi witnesses and present an alibi defense constituted sound trial strategy. Moreover, defendant has failed to demonstrate a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

Defendant next contends in his Standard 4 brief that the trial court abused its discretion by permitting the prosecutor to amend the information during trial to add a charge of discharge of a firearm toward a dwelling or occupied structure. Because defendant did not preserve this issue by objecting to the prosecutor's request to amend the information in the trial court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Id.* at 763, 774.

An information may be amended before, during, or after trial unless doing so would unfairly surprise the defendant or prejudice his defense. MCR 6.112(H); *People v McGhee*, 268 Mich App 600, 629; 709 NW2d 595 (2005); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). In determining whether an amendment to an information would unacceptably prejudice a defendant, a court must consider whether the amendment would cause unfair surprise, provide inadequate notice, or result in an insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). A completely new offense may not be added to an information by way of a motion to amend under MCL 767.76, *People v McGee*, 258 Mich App 683, 688; 672 NW2d 191 (2003), although this Court has also stated that an information may be amended to add a new charge under the statute, *People v Fortson*, 202 Mich App 13, 15-16; 507 NW2d 763 (1993). Regardless of any discrepancy in the case law regarding MCL 767.76 with respect to adding a new offense to the information, MCR 6.112(H) allows for

the addition of a new charge, as was done here, absent unfair surprise or prejudice. *McGee, supra* at 689; see also *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998).

Here, although the prosecutor moved to amend the information after the close of proofs, defense counsel admitted that the addition of the charge of discharge of a firearm toward a dwelling or occupied structure did not constitute unfair surprise and conformed to the proofs presented at trial. The prosecutor presented evidence that defendant fired a gun toward Stevenson's house, and, in fact, the trial court stated that "not only is there no surprise, the whole case was about the discharge." When asked whether he wished to offer additional closing argument pertaining to the added charge, defense counsel admitted that further argument would be redundant. The primary defense was that defendant did not participate in any manner in the crime, and, alternately, defendant argued that whether the dwelling was actually occupied and whether he had knowledge of occupation were not established by the evidence. A different or new defense strategy would not be needed relative to the added charge. Thus, defendant has not shown that the amendment of the information caused unfair surprise, provided inadequate notice, or resulted in an insufficient opportunity to defend.

Evidence of the shooting was also presented at the preliminary examination, although the district court did not rule on the matter in rendering the bindover decision given that the charge had not yet been pursued. Defendant's argument that he is entitled to reversal because he was effectively denied his right to a preliminary examination fails, considering that, pursuant to *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990), our Supreme Court has held that the harmless-error test applies to the preliminary examination stage. The *Hall* Court held that evidentiary error at a preliminary examination does not require reversal where the defendant receives a fair trial and is not otherwise prejudiced. *Id.*; see also *McGee, supra* at 698-699. The *McGee* panel noted that Supreme Court precedent allowed for the addition of charges after a preliminary examination took place when, as here, there was testimony at the preliminary examination to support the charges. *Id.* at 691. In *McGee*, the defendant also argued that she was denied the right to a preliminary examination when the circuit court granted a motion to amend the information to add a new charge at the time of trial after the defendant had previously waived her right to a preliminary examination on another original charge. *McGee* held that, because the circuit court acquired jurisdiction of the case relative to the unchallenged charge, the court could permit the prosecutor to add a new charge under MCR 6.112(H), absent unfair surprise or prejudice, despite the lack of a preliminary examination on the added charge. *Id.* at 696-697. The *McGee* panel concluded:

> Because this defendant's conviction was based on proof beyond a reasonable doubt, we can surmise that had a preliminary examination been conducted, defendant would have been bound over to circuit court for trial since the lesser standard of probable cause is used at preliminary examination. Because defendant has not established that the amended information otherwise affected the fairness of the trial or the reliability of the verdict, the alleged error, if any, in amending the information was harmless error relating to "pleading or procedure" that did not "[result] in a miscarriage of justice." [*Id.* at 698-699 (citations omitted; alteration in original).]

We conclude that defendant did receive a fair trial and was not prejudiced; therefore, the amendment of the information does not necessitate reversal for failure to provide defendant with a preliminary examination on the charge of discharge of a firearm toward a dwelling.

Defendant further argues that trial counsel was ineffective for failing to object to the prosecutor's motion to amend the information. As discussed above, however, the amendment did not unfairly surprise defendant or prejudice his defense, and it conformed to the proofs presented at trial. Thus, defense counsel had no basis on which to object to the prosecutor's motion. "[C]ounsel does not render ineffective assistance by failing to raise futile objections." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Peter D. O' Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald